No. 42310-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KIRT D. JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 11-1-00608-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was produced at trial to support Jones's conviction for second degree burglary and second degree theft.

2. Whether the court applied a mandatory presumption of criminal intent, thus relieving the State of the burden of proving the intent element of second degree burglary.

3. Whether Jones was entitled to have the court consider the lesser-included crime of criminal trespass.

B. STATEMENT OF THE CASE.

The State accepts Jones's statement of the case.

C. ARGUMENT.

1. There was sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Jones entered the victim business unlawfully and with the intent to commit a crime therein.

Jones argues that because the evidence against him was circumstantial, it was insufficient to prove all of the elements of second degree burglary and second degree theft.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim if insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting

testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Jones asserts that the court reached a guilty verdict by a 'pyramiding of inferences," citing to State v. Weaver, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962). Appellant's Opening Brief at 9. However, the reasoning of Weaver has been abandoned by the Supreme Court. State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).

> It is true that we have stated that the essential proofs of guilt cannot be supplied by a pyramiding of inferences. . . . [O]ur decision in *Weaver* was predicated on our application of the former rule which required that if a conviction rests solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. We have since rejected this rule in favor of the rule that whether the evidence be direct, circumstantial, or a combination of the two, the jury need be instructed that it need only be convinced of the defendant's guilt beyond a reasonable doubt. . . ."If the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on a 'pyramiding of the inferences.'"

Id. at 711 (internal cites omitted).

In Jones's case, the evidence was that whoever broke into the victim business at 2:30 a.m. threw rocks through a window over

a pair of French doors, pulled a garbage can beneath the window, and climbed through the broken window. There was a shoe print on the lid of the garbage can. CP 23. There were detectors on the doors that would trigger an alarm, as well as motion detectors inside the office, but there was a 30-second delay before the alarm would sound. RP 110-11.[1] A person could see from the outside that the doors were armed. RP 110, 117. A computer and monitor that had been near the front door were missing. CP 23. The room was small, no more than 12 by 14 feet wide. RP 117. Drops of blood were found on the inside of the rear doors, the rug inside near the back doors, and a shard of broken glass inside the building. The glass was collected as evidence and eventually sent to the Washington State Patrol Crime Laboratory for testing; it proved to be Jones's blood. CP 24. Several cords were found along a path leading away from the building that were consistent with cords that would have been attached to the missing computer. CP 24.

The evidence proved beyond a reasonable doubt that Jones climbed through the broken window. There was no other way his blood would have gotten onto the broken shard of glass and the

1 All references to the Verbatim Report of Proceedings are to the trial transcript of June 27, 2011.

inside of the office. The alarm sounded 30 seconds after motion was detected inside the building. Only one computer and a monitor were taken even though there were other computers in the office. RP 119, 121. Dropped cords indicated that the person who took the computer and monitor was in too much of a hurry to properly disconnect the components before fleeing through the back doors, which were found ajar. CP 23. Therefore, the inescapable conclusion was that the entry, theft, and exit happened in a very short period of time. Jones argues that there was no evidence that he took the computer and monitor or that he entered the building with the intent to commit a crime. However, somebody entered unlawfully and stole property. The court could reasonably conclude that there would not have been time for more than one person to enter through the broken window before the alarm sounded, and because Jones's blood was present, and the computer and monitor missing, he had entered or remained unlawfully in the building with the intent of committing a crime—theft. CP 4. However, even if there had been another person present, and that person actually took the computer and monitor, Jones would have clearly been an accomplice. It is impossible to think of any reasonable scenario which would put Jones inside the building at that time and in that

manner without being either the principal or accomplice in the burglary.

> 2. The court did not apply a mandatory presumption to its finding of intent, and there was no shifting of the burden to the defendant to prove a non-criminal intent.

The State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). In doing so, the State may use devices such as inferences and presumptions.

> A mandatory presumption instructs the jury that it "*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." . . . The constitutionality of a mandatory presumption is evaluated in light of the jury charge read as a whole to ensure it does not shift the burden of persuasion on any element of the offense.. . A permissive inference or presumption permits, but does not require, the jury to infer an element of the offense, an "elemental" or "presumed" fact, from an "evidentiary" or "proved" fact. . . . Permissive inferences do not relieve the State of its burden of persuasion because the State must still convince the jury the suggested conclusion should be inferred from the basic facts proved. . .

Id. (emphasis in original, internal cites omitted).

RCW 9A.52.040 creates a permissive inference that a person who enters or remains unlawfully in a building may be inferred to have acted with the intent to commit a crime therein.

State v. Cantu, 156 Wn.2d 819, 822, 132 P.3d 725 (2006). Had this been a jury trial, the jury instructions would have included WPIC 60.05:

> A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein [unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent]. This inference is not binding on you and it is for you to determine what weight, if any such inference is to be given.

WPIC 60.05, 11A Wash. Prac., at 15 (2008).

Where the inference is only a part of the State's proof of an element, the presumed fact must follow "more likely than not" from proof of the basic fact. Hanna, 123 Wn.2d at 710 (citing to County Court of Ulster Cy. V. Allen, 442 U.S. 140, 165, 167, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979). If the inference is the "sole and sufficient" proof of the element, the standard of proof is beyond a reasonable doubt. State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). Intent may not be inferred from equivocal conduct, but it may be inferred from conduct that indicates intent "as a matter of logical probability." State v. Lewis, 69 Wn.2d 120, 124, 417 P.2d 618 (1966). The courts have never required that the presumption

be accurate in every conceivable situation. Ulster, 442 U.S. at 156 n.14.

In Jones's case, a person who left blood at the scene had entered through a broken window above a pair of French doors, using a garbage can to gain enough height to be able to pull himself through the window. A computer and monitor were missing. Because the audible alarm would have sounded 30 seconds following detected movement in the office, only one computer was taken while other valuable electronics were untouched, and because computer cords or cables were dropped along a path leading away from the business, it is obvious that the person who entered left quickly and soon after entering. The court did not need the assistance of WPIC 60.05 or RCW 9A.52.040 to reasonably infer that the person who entered did so with the intent to commit a theft. Nor is the fact of entry the only evidence of intent to commit a crime. The computer was stolen.

Jones cites to this language by the court to support his argument that the court believed it was required to find criminal intent from the fact that his blood was found inside the business:

> The only reasonable inference that can be drawn is that Mr. Jones himself was inside that business at

> 2:30 a.m., and the only purpose that could be arrived at would be for purposes of stealing something.

RP 168, Appellant's Opening Brief at 11. On the contrary, there is nothing in the oral opinion of the court, RP 167-69, or in the Findings of Fact and Conclusions of Law, CP 22-25, to indicate that the court was even thinking in terms of the statute or WPIC. It was simply making a reasonable, common sense judgment that the person who left blood in the building took the missing property. The fact of the theft proved the intent to commit a crime.

By contrast, the court in Cantu found that the trial court in a juvenile case made a presumption it believed to be mandatory. In that case, Cantu had entered his mother's locked bedroom and money, medication, and alcohol were missing. He claimed to have accidentally broken the lock and denied taking anything. Cantu, 156 Wn.2d at 822-23. In closing, the State argued that Cantu had failed to rebut the inference of intent, and the court took that into account in finding Cantu guilty. Id. at 827-28. The Supreme Court interpreted the trial court's statements as an impermissible use of a mandatory presumption of intent. Id. at 828. Here, however, the prosecutor made no such argument, RP 157-62, 165-67. He argued that the only conceivable or reasonable goal of the intruder

or intruders was to steal, RP 165-66, but he never even suggested that it was a mandatory presumption or that Jones had any obligation to rebut it. Nor did the court's verdict imply that it felt itself bound to find intent by the fact of illegal entry. The fact that it is an obvious and reasonable conclusion that Jones entered with the intent to commit a crime does not make it a mandatory presumption.

> 3. Jones was not entitled to have the court consider the lesser-included crime of criminal trespass because the evidence did not support the conclusion that the only crime committed was criminal trespass.

In his Statement of Additional Grounds, Jones repeats the issues raised by his appellate counsel, but also argues that his theory of the case was that he was guilty only of criminal trespass and the court should have considered that lesser-included offense. SAG at 9.

The State does not dispute a defendant's right to have the trier of fact consider a lesser included offense when the law and the facts of the case permit.[2] Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the

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2 The majority of the case law discusses this right in terms of instructing the jury, and thus the authorities cited by the State frame the issue in those terms.

evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (3d Cir. 1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 s. Ct. 1993 (1973).

Under current Washington law, the defendant's right to a lesser included instruction is, in addition to his federal rights, a statutory right. RCW 10.61.006 provides:

> In all other cases [those not involving crimes with inferior degrees, RCW 10.61.003] the defendant may be found guilty of any offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to

know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser offense was committed is justified "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). The party requesting the lesser included instruction must point to evidence that affirmatively supports the instruction and may not rely on the possibility that the jury will disbelieve the opposing party's evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Leremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995).

In Jones's case there is no evidence to support a finding of criminal trespass but not burglary. Whoever entered the building, and the blood evidence shows it was Jones, stole property, thus making the crime burglary rather than criminal trespass. Therefore the court properly did not consider criminal trespass, nor was defense counsel ineffective for failing to argue it, because the facts do not support it. Jones cites to, appropriately enough, State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981), for the proposition that it is reversible error when failure to include a lesser offense in the

charging information prevents him from presenting his theory of the case. SAG at 9-10. The State assumes he meant jury instructions rather than charging information, because the information has no bearing on a defendant's ability to present his theory of the case, presuming it is relevant. Jones, however, held that where there was evidence to support a giving of a lesser-included, a failure to do so prevents the defendant from arguing his theory of the case. Jones, 95 Wn.2d at 623. Since the evidence in this case did not support a lesser-included charge, the Jones case is inapplicable

D. CONCLUSION.

The evidence presented at trial was sufficient to support a conviction for both second degree burglary and second degree theft. There was no mandatory presumption applied. The evidence did not support a finding that only the lesser-included offense of criminal trespass had been committed. The State respectfully asks this court to affirm both of Jones's convictions.

Respectfully submitted this 16th day of March, 2012.

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Attorney for Respondent

THURSTON COUNTY PROSECUTOR

March 16, 2012 - 4:44 PM

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